

## **Delaware Coastal Management Program Interstate Consistency Submission: Summary Response to Comments**

The Delaware Coastal Management Program (DCMP) solicited comments on its proposed list of federal activities subject to interstate consistency review from numerous state and federal agencies in August 2009, and allowed sixty days for responses. All requests for additional time were granted. Feedback received fell into 5 categories: general comments and comments on each of the four types of proposed activities- Dredging and Dredge Disposal, Offshore Alternative Energy, Exotic Species Introduction, and Air Emission Sources. Comments were received from the agencies listed below and are addressed by topic. DCMP responses are in bolded type.

1. Marvin E. Moriarty, Acting Regional Director, U.S. Fish and Wildlife Service, Northeast Region- October 7, 2009
2. Stanley Gorski, Field Offices Supervisor, National Marine Fisheries Service, Habitat Conservation Division- October 8, 2009
3. J. Robert Hume, Chief of Regulatory Office, Army Corps of Engineers, Norfolk District- October 26, 2009
4. John T. Hines, Deputy Secretary for Water Management, Pennsylvania Department of Environmental Protection- October 30, 2009
5. James W. Haggerty, Program Manager, Army Corps of Engineers, North Atlantic District Regulatory Program- November 2, 2009
6. Ruth Ehinger, Program Manager, New Jersey Coastal Management Program- November 24, 2009
7. John Filippelli, Chief of Strategic Planning and Multi Media Programs Branch, Environmental Protection Agency, Region 2- January 7, 2010

### **I. General Comments**

*Comments from ACOE-North Atlantic District:*

Expressed concern about potential conflict with the Nationwide Permit Program and the potential to increase the regulatory burden on the public

**Response: The DCMP sees no conflict between interstate consistency and the Nationwide Permit Program (NWPP). The federal actions proposed for interstate consistency review are large scale activities that are unlikely to qualify under the NWPP. For instance, dredging and subsurface discharge of dredged material of 50,000 cubic yards or greater; or placement of wind or water turbines are not eligible for the NWPP. The DCMP has proposed listing purposeful non-native shellfish introductions and there is a Nationwide Permit #48 (NWP 48) for Existing Commercial Shellfish Aquaculture**

**Activities. However, NWP 48 does not authorize the cultivation of new species (i.e. species not previously cultivated in a particular waterbody); Therefore, it is unlikely that purposeful non-native shellfish introductions would be eligible for this permit.**

**In regard to the concern about increasing the regulatory burden on the public, Federal Consistency regulations (15 CFR 930.156), encourage applicants to prepare one consistency determination that will satisfy the requirements of all affected states.**

Suggested that discussions be held with Philadelphia, Baltimore and Norfolk districts of the ACOE to develop an implementation plan upon approval by NOAA

**Response: The DCMP is willing to accommodate this request. We look forward to working with the affected ACOE districts to clarify the interstate review process.**

*Comments from EPA Region 2:*

No objections to the listing of the proposed activities to be reviewed under interstate consistency

**Response: None required**

*Comments from NMFS:*

Understands Delaware's desire to review the proposed activities and has no objections

**Response: None required**

## **II. Impacts to Coastal Resources Resulting from Dredging and Dredge Disposal**

*Comments from NJDEP:*

Amend description, "Activities such as dredging, filling, mining and excavation of 50,000 or more cubic yards", to read "Dredging, filling, mining and excavation of 50,000 or more cubic yards"

**Response: Table 1, titled "Geographic Location of Dredging and Dredge Disposal Projects", and accompanying description have been amended.**

Does mining include mining for sand for beach nourishment projects?

**Response: No, the DCMP does not intend to review sand mining activities for beach nourishment projects. Table 1 and accompanying description have been amended to clarify this.**

"Confined disposal facilities with the capacity to handle at least 50,000 cubic yards of dredged material that discharge directly into the Delaware River or Bay" is a geographic location not a federal action

**Response: Table 1 has been modified to reflect that confined disposal facilities are the location, not the action.**

NJCMP does not agree with the statement that Delaware's jurisdiction includes the entire Delaware River to mean low water of New Jersey's shore from Delaware's northern border to Artificial Island (known as the twelve mile circle). On March 31, 2008, the United States Supreme Court decided *State of New Jersey v. State of Delaware*, No. 134 Original, and addressed the issue of riparian jurisdiction in the 12 mile circle. The comments further elaborate that the court's decision "held that Delaware and New Jersey have overlapping jurisdiction to regulate 'riparian structures and operations of extraordinary character', and that Delaware cannot impede 'ordinary and usual' exercises of wharfing out from New Jersey".

**Response:** The statement in question is on page 3 and reads, "*Delaware's jurisdiction includes the entire River to mean low water of New Jersey's shore from Delaware's northern border to Artificial Island*". The statement was made to clarify why the DCMP did not seek to review dredging and dredge disposal activities in or discharging to the Delaware River within the aforementioned 12 mile circle. Simply stated, there is no need to seek interstate review of activities occurring within Delaware's established boundaries.

Further define the scope of the Delaware River and Bay subject to interstate review, such as "below the mean high tide line of the Delaware River from the Commodore Barry Bridge south to the Delaware State line"

**Response:** Table 1 has been amended as such.

Does the southern extent of the geographical area coincide with the NJ Coastal Management Program's geographical limit for the Delaware Bay?

**Response:** The southern extent of the geographical area coincides with the bay closing line between the Atlantic Ocean and Delaware Bay which extends from Cape May Point, New Jersey to Cape Henlopen Point in Delaware.

*Comments from PADEP:*

Believes that the Delaware River and Basin Commission is the proper forum to address interstate actions affecting the Delaware River and that the DRBC is an interstate compact commission with plenary authority over the waters of the basin

**Response:** The Office of Ocean and Coastal Resource Management responded to this same concern raised by PADEP on New Jersey's submittal for interstate consistency in a letter to NJCMP dated October 15, 2007. OCRM determined that their approval of a state's interstate consistency listing does not "displace, supersede, limit, or modify the Delaware River Basin Compact". The DCMP's intent is to ensure coordinated review of projects within the geographic locations proposed that are likely to affect our shared resources of the Delaware River and Bay. This is not in conflict with the Delaware River Basin Compact.

III. Impacts Resulting From Construction and Operation of Offshore Alternative Energy Systems

*Comments from NJDEP:*

Explain the meaning of the phrase, “structures associated with alternative energy systems” in Table 2

**Response:** By describing the federal action as “construction or placement of structures associated with alternative energy systems”, the DCMP was referring to the potential activities that could be authorized in state and OCS waters for alternative energy development, such as wind and wave turbines. To clarify, Table 2 has been amended to read, “siting, placement, construction and/or decommissioning of wind, wave, and tidal energy capture technologies”.

Hydrokinetic projects are still in the development stage, are small in scale and will not have a foreseeable coastal effect. These projects should be deleted from the list or included only with a size threshold.

**Response:** Alternative energy technology is a rapidly developing industry. While hydrokinetic ventures may be restricted to small scale pilot projects now, there is no means to predict the speed at which technological advances will be made and when pilot projects will become larger scale endeavors. By listing these activities now, the DCMP will receive notice of hydrokinetic projects within the proposed boundary and will be able to assess potential resource impacts on a case by case basis.

Please confirm that the term “coastal waters” means “ocean waters”

**Response:** The term “coastal waters” has been replaced with “ocean waters” in Table 2.

The geographic boundary is too large and the effects analysis does not demonstrate that projects within the boundary will have reasonably foreseeable effects on Delaware’s coastal zone.

**Response:** The coastal effects analysis addressed potential impacts to natural resources such as migratory birds and bats, fish, benthos, marine mammals and sea turtles. The analysis also addressed impacts to coastal uses such as commercial and recreational fishing, ship traffic, navigational safety concerns and conflicting uses. The DCMP contends that the activities listed within the geographic boundary identified will have reasonably foreseeable effects on Delaware’s coastal resources.

Ocean waters 3-24 nautical miles from New Jersey’s coast are federal waters not subject to interstate consistency.

**Response:** The DCMP recognizes that ocean waters within the contiguous zone (3-24 nautical miles) are federal waters, but we disagree with the comment that projects in federal waters are not subject to interstate consistency. The Minerals Management Service may issue several types of OCS leases and grants such as competitive commercial leases, non-competitive commercial leases, competitive

**right of way grants, non-competitive right of way grants, etc. The process for federal consistency review varies depending on which type of lease or grant is issued.**

**MMS's Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf; Final Rule (Federal Register, April 29, 2009, Vol. 74, No. 81, pg. 19652), describe how alternative energy projects will be subject to the provisions of the CZMA. The issuance of a non-competitive lease or grant would be reviewed as a Federal license or permit activity subject to federal consistency regulations 15 CFR part 930 subpart D (Consistency for Activities Requiring a Federal License or Permit). Following this example, an applicant for a non-competitive lease from MMS in federal waters offshore of New Jersey would be required to submit a federal consistency determination to the New Jersey Coastal Management Program. Upon approval of the DCMP's interstate consistency submission, the applicant would be required to notify Delaware as well. The DCMP would then have 30 days from receipt of notification to decide if the action would be reviewed for consistency with Delaware's coastal management policies.**

The Outer Continental Lands Act does not apply in state waters and should be removed as authority for listing projects within the 0-3 nautical miles from state's coastlines.

**Response: Table 2, titled "Geographic Location of Alternative Energy Systems", has been amended to reflect that the Outer Continental Lands Act is the legal authority for actions in federal waters, not state waters. Sections 9 and 10 of the River and Harbors Act and Section 404 of the Clean Water Act are the legal authorities for actions in state waters.**

Federal action should be revised to "Alternative energy development".

**Response: Table 2 has been amended to reflect this comment**

The coastal effects analysis only addressed OCS activities and did not include detail on alternative energy developments within state waters. What type of activities would be reviewed under this listing?

**Response: The activities within state waters would be the same as those described for OCS alternative energy development. The federal action description within Table 2 and accompanying text have been amended to provide clarification. Specifically, Table 2 has been amended to read, "siting, placement, construction and/or decommissioning of wind, wave, and tidal energy capture technologies" and applies to the entire geographic location; both state and federal waters.**

*Comments from USACE Norfolk District:*

More justification is needed for including Virginia waters for review of alternative energy projects. Drawing the boundary at the Virginia/North Carolina border is not supported by the effects analysis.

**Response: The proposed boundary for interstate review of alternative energy projects included Virginia waters because of the obvious proximity and the shared marine resources offshore of the Delmarva Peninsula. As discussed in the effects analysis, the Mid-Atlantic region of the ocean**

**supports similar species of migratory birds and bats, fish, benthos, marine mammals and sea turtles. These resources do not adhere to state boundaries and require more comprehensive, integrated management.**

**The Governors of New York, New Jersey, Delaware, Maryland and Virginia have recognized the need for a regional approach to managing offshore resources. In June 2009, the Mid-Atlantic Governors' Agreement on Ocean Conservation was signed by all five Governors. This agreement, in part, recognized the importance of the ocean resources of Mid-Atlantic and the need for a collaborative interstate approach to managing these resources. The DCMP contends that the activities listed within the geographic boundary identified will have reasonably foreseeable effects on Delaware's coastal resources. Furthermore, interstate consistency is an ideal means to engage states and federal agencies in a coordinated review process.**

Delaware has not indicated the criteria it would use to evaluate projects occurring within the Norfolk District. For instance, would Delaware find any and all wind turbines in Virginia's coastal zone to be objectionable, or only certain kinds/sizes/numbers?

**Response: The effects analysis clearly outlines the DCMP's support of alternative energy development. There is no criteria by which a project would be deemed "objectionable". The DCMP merely seeks the opportunity to assess projects (such as wind turbines offshore of Virginia), express any concerns and have those issues addressed through the consultation process. Interstate consistency is not intended to be a regulatory barrier; the intent is to foster early coordination between states and federal agencies and to establish a consistent review process. Through this process, Delaware seeks prompt, formal notification of offshore alternative energy proposals within the specified boundary. Pursuant to 15 CFR 930.155(c), the DCMP would then have 30 days from receipt of notification to decide if the action would be reviewed for consistency with Delaware's coastal management policies.**

#### **IV. Impacts resulting from the Introduction of Exotic Species**

*Comments from NJDEP and USACE North Atlantic District Regulatory Program:*

Revise the listing to clarify that only "purposeful" introductions of exotic species would be subject to review

Revise the listing to apply only to the Asian Oyster as the effects analysis focuses on this species

**Response: The listing has been modified to specify "purposeful" introductions. Additionally, the activity has been narrowed from the original, broader category of "exotic species" to specifically non-native shellfish. The coastal effects document has been amended to clarify this intent. The action now reads, "Purposeful Introduction of Non-native Shellfish".**

V. Impacts to Coastal Resources Resulting from Air Emission Sources

*Comments from NJDEP:*

No reasonably foreseeable effects on Delaware's coastal resources

NJ emission limits similar or more stringent than DE so review duplicative, NJ already provides DE with opportunity to comment on SIPs, rules, and Title V permits

National Ambient Air Quality Standards already require state coordination for shared nonattainment areas

*Comments from PADEP:*

New and existing coal fired power plant approvals and permits are a state air quality permitting action not subject to federal consistency review

New electric transmission line approvals and permits are granted by the Pennsylvania Public Utility Commission, not FERC, and thereby not subject to federal consistency review

Section 107 of the CAA provides that each state be primarily responsible for meeting the National Ambient Air Quality Standards and is not a federal action subject to review

**Response: In light of neighboring states' comments and opposition to the proposed actions associated with air emissions sources, the DCMP will not seek to list these activities for interstate consistency review. This action has been deleted from the coastal effects analysis for interstate consistency.**